SAN JUAN CITIZENS ALLIANCE

WESTERN COLORADO CONGRESS

IBLA 88-667 Decided May 24, 1990

Appeal from the Colorado Deputy State Director, Mineral Resources, Bureau of Land Management, affirming the approval of an application for permit to drill a coal-bed methane well and denying a request to stay
that approval. C-16942.

Dismissed.

1. Appeals: Generally--Rules of Practice: Appeals: Dismissal

An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. However, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of an appeal has taken place;
we have recognized that dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal of the appeal would tend to preclude the issue from ever being reviewed.

2. Application for Permit to Drill--Environmental Quality: Environmental Statements--Oil and Gas Leases: Drilling--Rules of Practice: Appeals: Dismissal

Where, on appeal, the principal objection to issuance
of an application for permit to drill a coal-bed methane well is the failure to consider the cumulative impacts of drilling the well in question in conjunction with other proposed coal-bed methane drilling in the same area, the appeal may be dismissed as moot, where the record shows that the well has been drilled and the surface managing agency and BLM have undertaken an environmental analysis designed to assess the cumulative impacts of such proposed drilling.

APPEARANCES: Jim Fitzgerald, Montrose, Colorado, for appellants; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On September 12, 1988, San Juan Citizens Alliance and the Western Colorado Congress (appellants) filed an appeal from an August 30, 1988, decision by the Colorado Deputy State Director, Mineral Resources, Bureau of Land Management (BLM), upholding the decision of the San Juan Resource Area Manager, BLM, approving Amoco Production Company's (Amoco) application for permit to drill (APD) the #1 Fischer-Mark Federal B Well. Included with the appeal was a request to stay the effectiveness of BLM's approval of the application.

On May 17, 1988, Amoco filed an APD for a coal-bed methane well on oil and gas lease C-16942 in the SE¼ SE¼ sec. 4, T. 34 N., R. 6 W., New Mexico Principal Meridian, within the San Juan National Forest. On August 10, 1988, BLM received a letter from the District Ranger, Pine Ranger District, San Juan National Forest, forwarding the approved surface use plan of operations for the permit and stating that the Forest Service concurred in the proposal. On August 11, 1988, the Area Manager approved the APD. On August 19, 1988, appellants filed a document styled "Notice of Appeal and Request for Stay" with the Area Office. The document indicated that an appeal to this Board was sought. The Area Office, however, properly treated the filing as a request for State Director review pursuant to 43 CFR 3165.3(b) and forwarded the case file to the Colorado State Office. See San Juan Citizens Alliance, 104 IBLA 288 (1988). The State Office received the case file on August 26, 1988, and issued its decision on August 30, 1988.

In that decision, the State Office denied the request for stay, noting that the well was spudded on August 25, 1988, and indicating that no stay would have been granted even if drilling had not commenced, because "[n]o information has been presented which indicates the likelihood of immediate, severe, and adverse impacts to federal resources if this well is drilled."

BLM characterized appellants' objections to the APD as focusing on three areas -- violations of the National Forest Management Act, 16 U.S.C. §§ 1600-1610 (1982), violations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332 (1982), and degradation of the ground water system. BLM found that since the Forest Service was responsible for the surface use plan and appropriate NEPA compliance, the first two areas of concern should be addressed to the Forest Service. BLM further stated that it understood that appellants had filed a concurrent appeal with the Forest Service.

Next, BLM found that its "technical review and analysis" undertaken at the time of processing of the APD disclosed no adverse effects to the ground water system, but that it would continue to monitor the situation.

In their appeal to this Board, appellants included the identical "Notice of Appeal and Request for Stay" filed with BLM. In addition, they object to BLM's action on their request for stay, alleging that BLM's failure to forward the case file to the State Office until after drilling commenced "appears to be a deliberate effort to negate the possibility of a

timely appeal." Appellants also argue that despite BLM's claim that only the Forest Service is responsible for NEPA compliance, "it is the BLM which has completed the Categorical Exclusion Review forms stating that there are no impacts in the areas of concern." Appellants assert that they included ground water information in their original appeal to BLM and indicate that BLM was not responsive to it.

Finally, appellants state that they are concerned with the cumulative impact of all the proposed drilling activity in the HD Mountains area and that a declaration that a particular appeal of one of the APD's is moot does not allow consideration of cumulative impacts.

In an order dated February 14, 1989, we denied appellants' request for stay as moot, noting that the APD had issued on August 11, 1988, and drilling had commenced on August 25, 1988. We summarized appellants' arguments and noted that BLM had filed no response thereto. We also pointed out that although BLM had asserted that the Forest Service was responsible for NEPA compliance, the record included a copy of a one page document styled "STATUS SHEET" regarding the well in question. We quoted the following conclusion which appeared at the bottom of that document: "FONSI [Finding of No Significant Impact] finding in the FINAL ENVIRONMENTAL IMPACT STATEMENT, San Juan National Forest, Vol. 1, 1983. The analysis in this document is sufficient to determine the environmental effects of the proposed action. This proposed action is within the scope (in the cumulative effects) of this document." That conclusion was dated August 11, 1988, and signed by one Donald Englishman, who was otherwise unidentified, and by the BLM San Juan Resource Area Manager, Sally Wisely. We indicated our belief that the Forest Service was not solely responsible for NEPA compliance.

We observed further that a July 29, 1988, memorandum by the District Hydrologist was limited to an assessment of impacts in T. 35 N., R. 6 W., New Mexico Principal Meridian, whereas the well in question is located in sec. 4, T. 34 N., R. 6 W. We also requested BLM to inform the Board of the status of both the #1 Fischer-Mark Federal B Well and the appeal filed with the Forest Service.

In response to the Board's order, BLM, on March 31, 1989, filed with the Board a memorandum dated March 27, 1989, from the Colorado State Director to the Regional Solicitor, which included four attachments. 1/

1/ On May 4, 1989, in further response to the Board's order, BLM filed with the Board a copy of the Final Environmental Impact Statement (FEIS), San Juan National Forest, and the Sept. 29, 1983, Forest Service Record of Decision for that FEIS. Also by memorandum dated Feb. 9, 1990, BLM's Colorado State Director informed the Board that the San Juan Resource Area had received various notices and reports for the #1 Fischer-Mark Federal B Well, among others, showing that the well had been completed. He also stated that one of the wells was capable of production in paying quantities, but that no paying determination had been made for the #1 Fischer-Mark

Attachment 1 consists of two Sundry Notices and a Monthly Report of Operations (MRO's) for the months of August through December 1988. The December 1988 MRO indicates the well status as "GSI," for gas shut-in.

Attachment 2 is a letter dated August 26, 1988, from William Sexton, Forest Supervisor for the San Juan National Forest, to appellants' representative. The letter advised appellants that their appeal to the Forest Service was being dismissed as moot under applicable regulations, and
that while a dismissal was appealable, an appeal would probably not be effective.

Attachment 3 is the San Juan Resource Area Fluids Geologist's local and regional ground water synopsis. This document states that it is "BLM's belief that potential aquifers which may be present above the producing horizon in the subject well have been adequately protected." This conclusion was based on the fact that "cement was circulated behind the 5 1/2 [inch] production casing from the total depth to the surface." With respect to the impact of methane extraction on "regional ground water," the synopsis states that concern for aquifers increases where "drilling moves closer to the edge of the [San Juan] basin where the coal beds (as well as most other formations) are abruptly 'bent upward' and are eventually exposed at the rim of the basin." As a result of this concern, he states, BLM undertook
"a review of the surface geology and state water engineers' water well permit data," and the Montrose District Hydrologist prepared a July 29, 1988, memorandum to the San Juan Resource Area Fluids Geologist (included as part of Attachment 4) in conjunction with that review. That memorandum summarizes the impact on ground water of the coal-bed methane drilling. The hydrologist concluded therein, based on his preliminary assessment, that
the chance of significant injury to ground water aquifers by methane production "is minimal." He stated, however, it would help to substantiate that conclusion if drilling companies were required to collect and file additional data pertaining to static water level, depth and thickness of formations, and water quality samples measuring cations and anions.

The fluids geologist explained in his synopsis that the reason the hydrologist's memorandum referred to T. 35 N., rather than T. 34 N., where the subject well is located, is

> because the outcrop of the Fruitland formation (the source of the water production in the subject well) lies in T. 35 N. Therefore the impact on usable groundwater of withdrawing water from the Fruitland in the subject well (from a depth of approx. 2193-2324 feet) would most likely be to the vicinity of the outcrop since nearly 1000 [feet] of impermeable shales & siltstones lie between the Fruitland Formation and the surface in the immediate vicinity

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fn. 1 (continued)
Federal B Well. BLM's filings indicate that they were all served on appellants. Appellants submitted no further filings in response thereto.

> of the subject well. Also, the lenticular nature of paludal (coal bearing) deposits almost certainly precludes hydrologic continuity over great distances (i.e., > 2-3 miles) unless secondary avenues of communication such as faults and fractures are present.

Attachment 4 to the State Director's memorandum is described in the memorandum as "a brief history of our technical review and analysis."

With regard to our question regarding NEPA compliance, the State Director explained in his memorandum:

> We also wish to explain why it is that at the bottom of the status sheet there is a Finding of No Significant Impact statement. The Notice of Staking for this well was received on October 13, 1987, prior to the Oil and Gas Leasing Reform Act of 1987 [Pub. L. 100-203, 101 Stat. 1330-259 (Dec. 22, 1987)]. A Categorical Exclusion Review was done at the time of the onsite on October 27, 1988. [2/] After the Act was passed, the BLM was not responsible for preparing the NEPA documentation on FS actions (i.e. approval of the surface use plan). The information in the case file appears confusing, but is a reflection of the change in policy and procedure as a result of the Reform Act.

This statement by the State Director does not explain the "STATUS SHEET" conclusion, dated August 11, 1988, which is quoted above. While the Forest Service is responsible for NEPA compliance regarding approval of surface use plans, 3/ the onshore oil and gas operations regulations impose a duty on BLM as well. Thus, 43 CFR 3162.5-1, relating to environmental obligations, provides at subsection (a):

> Before approving any Application for Permit to Drill submitted pursuant to § 3162.3-1 of this title, or other plan requiring environmental review, the authorized officer shall prepare an environmental record of review or an environmental assessment, as appropriate. These environmental documents will be used in determining whether or not an environmental impact statement is required and in determining any appropriate terms and conditions of approval of the submitted plan.

It would appear that the "STATUS SHEET" conclusion was issued in contemplation of satisfaction of the 43 CFR 3162.5-1(a) obligation. We note, however, that our review of the FEIS does not reveal the existence of a

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2/ There is no copy of a "Categorical Exclusion Review" in the case file before the Board.

3/ Under Forest Service regulations published in 1989, approval or disapproval of surface use plans of operations related to the authorized use and occupancy of a particular site is appealable within the Forest Service pursuant to the regulations in 36 CFR Part 251, Subpart C. 36 CFR 251.82(a)(12).

FONSI (see FEIS Table of Contents at i-iv), 4/ although the FEIS is accompanied by a 14-page Record of Decision dated September 29, 1983. We cannot find any analysis in either the FEIS or the Record of Decision which is, as stated in the "STATUS SHEET" conclusion, "sufficient to determine the environmental effects of the proposed action." Those documents, standing alone, were inadequate to address the environmental impacts of coal-bed methane drilling. 5/

[1] An appeal is generally dismissed as moot, where, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant. In Re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51 (1990); The Hopi Tribe v. OSMRE, 109 IBLA 374, 381 (1989); The Sierra Club, 104 IBLA 17, 19 (1988); Blackhawk Coal Co. (On Reconsideration), 92 IBLA 365, 93 I.D. 285 (1986). In Utah Wilderness Association, 91 IBLA 124, 130 (1986), the Board dismissed as moot an appeal of a BLM decision denying a protest challenging the issuance of permits to drill various oil and gas wells in a wilderness study area because all the authorized activities under the permits had taken place by the time the appeal was briefed before the Board.

Nevertheless, the Board does not automatically dismiss every case where the action sought to be prevented by the filing of the appeal has taken place. Colorado Environmental Coalition, 108 IBLA 10, 15 (1989); Yuma Audubon Society, 91 IBLA 309, 312 (1986). As we stated in Southern Utah Wilderness Alliance, 100 IBLA 63, 67 (1987), dismissal of a particular appeal may not be warranted in a circumstance where the appeal presents a recurring issue and dismissal would tend to preclude the issue from ever being reviewed.

[2] In this case because the activities authorized under the APD have taken place, the appeal is moot, unless appellants have raised a recurring issue which might be evasive of review if it is not now considered by the Board. In this case, appellants' major concern appears to be the cumulative impact of drilling a number of these coal-bed methane wells in the area of the HD Mountains. It is true that in cases involving APD's, the agencies having jurisdiction over the lands involved, have the responsibility to consider foreseeable cumulative impacts associated with existing and proposed drilling and production activity, together with associated surface disturbances. See Colorado Environmental Coalition, supra at 18. Given the fact that 43 CFR 3165.4(c) places a decision approving an APD into full

4/ It seems unlikely that the FEIS would have contained a FONSI, since that term is defined in the regulations at 40 CFR 1508.13 as "a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared."

5/ That conclusion is based on our review of those documents and on the Feb. 24, 1989, letter from the Forest Service to BLM, quoted infra.

force and effect pending resolution of an appeal and a permittee may be able to complete its drilling operations before the Board can act on a request for stay, or in this case even before the Board receives the request,
the Board will very carefully consider whether dismissal of the appeal
will prejudice the right of an appellant to have effective review of its complaints. 6/

In this case, dismissal of appellants' appeal will not result in their concern regarding cumulative impacts evading review. The record indicates that cumulative impacts have been or are now being addressed by the Forest Service and BLM. The record includes a copy of a letter forwarded to the Board by BLM with its March 31, 1989, response to our order. Although not referenced in the State Director's March 27, 1989, memorandum, that letter, dated February 24, 1989, from the District Ranger, Pine Ranger District, Forest Service, to the BLM San Juan Resource Area Manager, states:

> The Forest Service will be conducting an environmental analysis on the Coalbed Methane project in the HD Mountains this year.
> I am requesting the BLM participate as a formal cooperating
> agency by providing technical assistance related to drilling, ground water and production activities. This request is based
> on the Supplemental Interagency Agreement between the BLM and FS in Colorado. Ideally, this EIS would be signed by agencies and would satisfy the environmental documentation requirements for both. Your continuing cooperation is greatly appreciated.

Thus, we must conclude, under the circumstances of this case, that appellants have not presented any arguments which are evasive of review.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Bruce R. Harris
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

6/ Generally, a person may seek the stay of a decision to issue an APD in a particular case, and if that stay is sought from the Board, the Board will apply the standards adopted in Marathon Oil Co., 90 IBLA 236, 245, 93 I.D. 6, 11-12 (1986), in determining whether to grant the request.